Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1995

Joyce H. Crandon, Petitioner
vs.
Frankie D. Dunnick
Commissioner of the Kansas Banking
Commission,
Individually, Respondent

On Petition For Writ of Certiorari
To the Supreme Court
of the United States

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Whether a special assistant attorney general employed by the State of Kansas, Banking Commission as General Counsel can be fired for exercising of her First Amendment rights of Freedom of Speech, where she inquires about federal law and policy to the Regional General Counsel of the Federal Deposit Insurance Corporation [FDIC]?

Whether all attorneys lose their First Amendment right to freedom of speech when they accept employment for the State of Kansas?

Whether the Kansas Supreme Court erred in affirming the district court's granting summary judgment when there were disputed material facts?

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JURISDICTIONAL STATEMENT

Petitioner submits herewith the jurisdictional statement as required by Rule 15 of the Rules of the Supreme Court of the United States.

The jurisdiction of this court is invoked under the provisions of 28 U.S.C. §1257 (3).

This is an appeal from the highest state court in the State of Kansas; the Supreme Court of the State of Kansas. That Court affirmed the District Court's Summary Judgment on the Petitioners cause of action filed in state court under 42 U.S.C. §1983. June 2, 1995 was the date of the judgment sought to be reviewed.

June 29, 1995 Notice of Appeal was filed with the Kansas Supreme Court.

Petitioner was granted an extension of time in which to file this brief until October 30, 1995 by the Clerk of the Supreme Court in a letter dated August 4, 1995: Re: Application No. A-106.

c. the statutory provision conferring jurisdiction on appeal: This appeal is taken pursuant to U.S.C. 28 §1257.

This case involves a federal question involving 42 U.S.C. §1983. A federal question in a civil action for deprivation of civil constitutional right of freedom of speech. In that Dunnick, Respondent, Kansas Bank Commissioner under color of state law caused a citizen of the United States to wit: Crandon, Petitioner, former General Counsel to the Kansas Banking Department and Assistant Attorney General of the State of Kansas, to be deprived of her rights and privileges secured by the United States Constitution i.e. her right to Freedom of Speech under the First Amendment.

STATUTE INVOLVED

U. S. Constitution, First Amendment:
42 U.S.C. §1983. Civil action for deprivation of rights
42 U.S.C. §1988. Proceedings in vindication of civil rights

IN THE SUPREME COURT
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Joyce H. Crandon, Petitioner
vs.

Frankie D. Dunnick,
Commissioner of the
Kansas Banking Commission,
Individually, Respondent

PETITION FOR WRIT OF CERTIORARI
TO THE
SUPREME COURT OF THE UNITED STATES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States.

Joyce H. Crandon, the petitioner herein, prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Kansas entered in the above-entitled case on June 2, 1995.

STATEMENT OF THE CASE

Crandon files this petition for writ of certiorari, to review the final judgment of the Kansas Supreme Court. That Court affirmed the district courts granting of summary judgment in favor of the respondents, the State of Kansas and Frankie Dunnick, Kansas Banking Commissioner.

Crandon was an attorney and was employed as General Counsel of the State of Kansas Banking Department. Her employment began November, 1991. She was fired from her job on July 13, 1992 by the Respondent Frankie D. Dunnick [hereafter Dunnick] the Kansas Banking Commissioner. Dunnick had been appointed Commissioner by the Governor in March, 1991.

Judi Stork was the Deputy Bank Commissioner.

In May 1992, Review Examiner Berggren of the Kansas Banking Commission, came to Crandon with evidence that Deputy Bank Commissioner Stork and her spouse, Mr. Robert Stork, had personal loans (a car loan, home mortgage,) at state-chartered banks, the Baileyville State

Bank and the now defunct Southwest Bank & Trust of Topeka.

In Review Examiner Berggren's opinion, the loans were in possible violation of state and federal law, in particular of 42 U.S.C. §1983 as well as the Code of Federal Regulations. Review Examiner Berggren requested Crandon to review the matter and advise him accordingly.[1] [Berggren deposition p. 327-330.]

It is uncontroverted that one of Crandon's primary job duties was to "give legal advice and counsel to Review Examiners at the Kansas Banking Commission". [Dunnick deposition p. 2. exhibits] In reviewing the matter, Crandon consulted statutes, regulations and relevant cases. [Crandon deposition p. 350.] In addition, she obtained copies of Stork's home mortgage, auto registration,[2] and other information which confirmed the existence of loans. Crandon knew that Deputy Commissioner Stork had examined the Southwest Bank and Trust. [Crandon deposition p. 260.] The fact that Deputy Commissioner Stork had examined the Southwest Bank and Trust was not ever denied by Dunnick.

As part of the review and research of the matter, Crandon telephoned Regional General Counsel of the FDIC Lamberti, in June, 1992, to inquire about federal law, federal regulations, and related policies regarding extensions of credit to bank examiners and their spouses. [Crandon deposition p. 232.]

The FDIC and the Kansas Banking Department are co-regulators of state-chartered banks in Kansas. The FDIC and the Kansas Banking Department do alternate banking examinations, and on some occasions conduct joint examinations with respect to actions against banks located in Kansas.

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1 This is a petition for review from a summary judgment. There was no testimony by any witnesses. There is no transcript or record of any testimony. Therefore the plaintiff is citing discovery depositions and discovery documents.

2 All a matter of public record in the State of Kansas.

After one of the conversations with Crandon, Regional General Counsel of the FDIC Lamberti, spoke with someone in the Division of Supervision at the FDIC about his conversation with Crandon and her inquiries. [Lamberti deposition p.22.]

On Thursday, July 9, 1992, Dunnick and Deputy Commissioner Stork traveled to Kansas City to meet Ray Pritchett Regional Director of the FDIC to discuss action on several banks in Kansas. At that time Regional Director Ray Pritchett informed Dunnick that he had received inquiries from the Kansas Banking Department about the loans of a high ranking government official Deputy Commissioner Stork.

On Friday, July 10, 1992, Dunnick met with Review Examiner Berggren, who was thereafter removed as the Review examiner for the Baileyville State Bank examination;[3] which was in progess in June and July of 1992. Dunnick questioned Review Examiner Berggren, as to; who knew about the inquiry into Deputy Commissioner Stork loans? [Berggren deposition exhibit # 55.] Dunnick admitted that the revelation that Crandon and Berggren had called the FDIC with inquiries about Deputy Commissioner Storks loans made him furious and embarrassed. [Dunnick deposition p. 51-53.] Review Examiner Berggren was a classified civil service employee protected by Kansas Civil Sevice laws.

On Monday, July 13, 1992 Crandon was fired by Dunnick because of this communication with the Regional General Counsel of the FDIC. Crandon, 897 P.2d at 102 [Appendix p. 3.]

Crandon tried to discuss the matter of the Stork loans with Dunnick. He harshly responded, "don't mention Judi [Deputy Commissioner Stork], I've taken care of that." He stated that, "I know you've been talking to Eric [Review Examiner Berggren], I want you to know that no one goes over my head to the FDIC–it makes me look like I don't

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3 One of the banks that Deputy Commissioner Stork had a loan.

know what's going on." [Crandon deposition p. 2 exhibit notes.]

Dunnick then stated angrily "that if Crandon 'did anything' about this; that he knew people, had 'connections' and would 'make it hard on her' [Crandon]". Dunnick repeated twice; that if Crandon 'did anything' about the termination, she would "regret it." Then Crandon was handed a letter of termination. [Crandon deposition p. 2 exhibit notes.]

The Petitioner Joyce H. Crandon [hereafter Crandon] brought an action in the state district court in Kansas against the State of Kansas and Frankie D. Dunnick [Dunnick] as Commissioner in his official and individual capacities.

Crandon alleged violation of her First Amendment rights under 42 U.S.C. §1983 and statutory and common law whistle-blowing retaliatory discharge.

The state district court sustained the defendants' motion for summary judgment. Crandon appealed to the Kansas Supreme Court who affirmed the trial courts decision.

This is an appeal from the highest court of the State of Kansas.

Important to this case is the fact; that Dunnick, after receiving the trial courts decision, filed a complaint against Crandon with the Kansas Attorney Disciplinary Administrator. That office conducted a through investigation into the allegations against Crandon and found no probable cause that Crandon violated any of the Model Rules of Professional Responsibility for Attorneys. The complaint that Dunnick filed against Crandon was dismissed.

REASONS FOR GRANTING WRIT

ISSUE I. Whether a special assistant attorney general employed by the State of Kansas, Banking Commission as General Counsel can be fired for exercising of her First Amendment rights of Freedom of Speech, where she inquires about federal law and policy to the Regional General Counsel of the Federal Deposit Insurance Corporation [FDIC]?

I. a.) The decision of the Kansas Supreme Court in Crandon v. State of Kansas and Frankie Dunnick, 257 Kan. 727, 897 P.2d 92 (1995) conflicts with the decision of the United

States Supreme Court in Waters v. Churchill, 114 S. Ct. 1878, 128 L.Ed. 2d 686., ____ U.S. ___ (1994).
In Waters 114 S. Ct. at. 1889, the court stated;

> We agree that it is important to ensure not only that the substantive First Amendment standards are sound, but also that they are applied through reliable procedures. This is why we have often held some procedures--a particular allocation of the burden of proof, a particular quantum of proof, a particular type of appellate review, and so on--to be constitutionally required in proceedings that may penalize protected speech. See Freedman v. Maryland, 380 U.S. 51, 58-60, 85 S.Ct. 734, 738-740, 13 L.Ed. 2d 649 (1965) (government must bear burden of proving that speech is unprotected).

In Waters, 114 S. Ct. at 1886,

> We have never set forth a general test to determine when a procedural safeguard is required by the First Amendment--just as we have never set forth a general test to determine what constitutes a compelling state interest,. . . .we agree that some procedural requirements are mandated.

Id. at 1884-1890 ,

> (a) Absent a general test for deciding when the First Amendment requires a procedural safeguard, the question must be answered on a case-by-case basis, by considering the procedure's cost and the relative magnitude and constitutional significance of the risks of erroneous punishment of protected speech and erroneous exculpation of unprotected speech that the procedure involves. In evaluating these factors here, the key is the government employer's interest in achieving its goals as effectively and efficiently as possible.

Id. at 1886;

> . . . that courts must not apply the Connick test only to the facts as the employer thought them to be, without considering the reasonableness of the employer's conclusions. It is necessary that the decisionmaker reach its conclusion about what was said in good faith, rather than as a pretext; but it does

not follow that good faith alone is sufficient under the First Amendment.

Id. at 1886;

For government employee's speech to be protected, it must be on a matter of public concern and the employee's interest in expressing herself on the matter must not be outweighed by any injury the speech could cause to the interest of the state as an employer in promoting the efficiency of public services it performs through its employees.

In Crandon, the Kansas Supreme Court ruled that Crandon's speech was a matter of public concern. Crandon, 897 P.2d at 98. [Appendix p. 11.]

In Waters, 114 S. Ct. at 1878 .

Government employees are often in the best position to know what ails the agencies for which they work; 'public debate may gain much from their informed opinions' Pickering at 1736; And a government employee, like any citizen, may have a strong, legitimate interest in speaking out on public matter. In many such situations the government may have to make a substantial showing that the speech is, in fact, likely to be disruptive before it may be punished. See. Rankin v. McPherson, 483 U.S. 378, 388, 107 S.Ct. 2891, 2899.

In Waters, 114 S. Ct. at 1893, Justice Scalia states;

Government agencies are often the site of sharp differences over a wide range of important public issues. In offices where the First Amendment commands respect for candid deliberation and individual opinion such disagreements are both inevitable and desirable. When those who work together disagree, reports of speech are often skewed, and supervisors are apt to misconstrue even accurate reports. The plurality, observing that managers "can spend only so much of their time on any one employment decision" ante, at 1890, adopts a rule that invites discipline, rather than further discussion, when such disputes arise. That rule is unwise, for deliberation within the government, like deliberation about it, is an essential part of our "profound national commitment" to freedom of speech. A proper regard

for that principle requires that, before firing a public employee for her speech, management get its facts straight.

Further, Justice Scalia in Waters, 114 S. Ct. at 1900 stated,

> A First Amendment claimant need not allege bad faith; the controlling question is not the regularity of the agency's investigative procedures, or the purity of its motives but whether the employee's freedom of speech has been abridged. Justice Scalia would recharacterize employees' right to free speech as a more modest protection against "retaliatory" discharges, a protection that would not extend to those terminated for speech that was fully protected but incorrectly reported.

The Crandon court found that Crandon's speech was a matter of public concern and that Crandon was fired because of such speech. Crandon, 897 P.2d at 98. [Appendix p. 3.]

In Crandon, Dunnick did not use, reasonably reliable procedures to determine that the First Amendment did not protect Crandon's speech. Dunnick found out that Crandon and Review Examiner Berggren had made inquiries about federal ethics law on Thursday July 9, 1992 and Crandon was fired at 9:00 a.m. on Monday morning July 13, 1992. There was no reasonably reliable procedure to determine whether the First Amendment protected Crandon's speech. Crandon was fired in retaliation for her inquiries to the FDIC about federal law as it related to a high-ranking government official in the Kansas Banking Commission.

The Kansas Court found in Crandon that the plaintiff was fired for her communication with the FDIC. Crandon 897 P.2d at 94-98. [Appendix p. 3-4.]

It is important that Review Examiner Berggren was making phone calls seeking advice in reference to the Deputy Commissioner Stork matter as it related to the Baileyville Bank examination. Review Examiner Berggren called the FDIC for advice on a daily basis. This was not unusual or out of the ordinary for Review examiners to do so. The only difference in this instance was that the questions were about a bank partially owned by Deputy Commissioner Stork, a high-ranking government official. And that she had been

appointed to that position by Dunnick. [Berggren deposition exhibit # 55. p. 20-24.]

The Kansas Supreme Court states in Crandon 897 P.2d at 102-103. [Appendix p. 20.]

> "Plaintiff's position as chief counsel for the organization required a close working relationship with Dunnick. Dunnick relied on plaintiff for legal advice for his guidance and for the guidance of the organization and its employees. The organization's attorney has a responsibility to give advice when necessary to prevent or rectify unlawful or improper acts of the organization and its employees. This advice must be given by presenting the attorney's opinion to the proper person or persons in the organization who have the authority to correct the problems. A close relationship and need for trust are essential in an attorney's relationship with the organization. This, a wide degree of deference to Dunnick's decision to terminate plaintiff is appropriate when something occurs to disrupt that relationship and trust.

Let us analyze what the Court has ruled. Dunnick relied on Crandon for legal advice for the guidance of the organization and its employees. Review Examiner Berggren, a organization employee, had requested that Crandon give to him an opinion on an issue. This issue just happened to involve legal policies and a high-ranking Kansas government official that had been appointed to such position by Dunnick. On other occasions Crandon had been given issues to research and in which to give an opinion by a Review Examiner Berggren, without presenting the issue to Dunnick first.

Review Examiner Berggren had told Crandon that he had discussed the matter of the loans of the high-ranking government official with Dunnick. [Berggren deposition exhibit # 55.] That was the job of the head bank Review Examiner. It was the duty of the review examiners of the Kansas Banking Commission to communicate with the Commissioner on bank examinations issues. Review Examiner Berggren asked Crandon to research issues of federal ethics laws and policy. Crandon had called FDIC Regional Counsel Lamberti about questions of law about

other issues not involving a high-ranking government official and Crandon did not get fired for doing that.

If there is nothing iniquitous about Deputy Commissioner Stork's loans, why was Dunnick so concerned about Emery's defense attorney Ebert knowing about the loan? Dunnick asked Crandon "Did you ever tell Bill Ebert about the extensions of credit? A. No, I did not." [Crandon deposition p. 243.] [4]

Additionally on July 22, 1992, after Crandon's dismissal Dunnick addressed a memo regarding Examiner Activities at State Chartered Banks. In this memo he states: [Crandon deposition p.2 exhibit.]

> TO; Deputy, Assistant Deputy, Review Examiners, All Field Examiners
> FROM: Commissioner Dunnick
> Date: July 22, 2992
> RE: Examiner Activities at State Chartered Banks
> Over the past several months, it has come to my attention that two Banking Department employees have, in the past, had overdrafts in checking accounts held at state chartered banks. Although they appear to have been inadvertent, these overdrafts could be construed as loans and as such a prohibited activity for an examiner from this department. (Ethics policy 89-13).
> The individuals involved in these separate incidents have been counseled and/or reprimanded for what I consider to have been their failure to exercise good judgment. As a result, I consider the matter, in relation to these individuals, closed. The general issue of examiner involvement with state chartered banks, however, is an area which I believe warrants further discussion.

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[4] Note: Kansas Bank examiner Emery was fired by Dunnick for having a loan at a state-chartered bank. Emery appealed Dunnick's decision to the Kansas Civil Service Board for a due-process hearing.

If Deputy Commissioner Stork, a high-ranking government official had not violated the law or policy with her overdrafts; why did Dunnick issue this memo?

Let it be very clear that the only evidence the district court had or that the Kansas Supreme Court had that there was no violation were the self-serving words of Dunnick and witness Deputy Bank Commissioner Stork themselves. There never was any investigation by anyone into any of the questions that the Kansas Bank examiners had about the Deputy Commissioner Stork matter.

I. b.) The decision of the Kansas Supreme Court in Crandon 897 P.2d 92. (1995) conflicts with the decision of the United States Supreme Court in Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 75 L.Ed. 2d 708.

The Kansas Supreme Court in its decision affirming the Shawnee County District Court's granting of summary judgment Crandon 897 P 2d. at 102. [Appendix p. 18.] states.

> "The balancing test is set forth in Connick v. Myers, 461 U.S. 138, 75 L.Ed. 2d 708, 103 S. Ct. 1684 (1983), and Pickering v. Board of Education, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and weighs an employee's First Amendment rights against the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.
>
> In Connick, an assistant district attorney was involved and the United States Supreme Court said: "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52. The Supreme Court held the discharge of the assistant district attorney did not offend the First Amendment.
>
> The Connick Court also held that whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a question of law and is subject to de novo review. See 461 U.S. at 150 n.10.
>
> In Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992), an attorney claimed wrongful discharge for

exercising First Amendment rights. The court used language we deem applicable to our case: "The existence or not of attorney-client relations also bears on whether there was present the 'close working relationship' referred to in Connick that gives rise to a 'wide degree of deference' to the employer's judgment. Connick, 461 U.S. at 151-52, 103 S. Ct. at 1692. Moreover, definition of Goffer's role with relation to defendants is prerequisite to addressing whether her speech so destroyed her effectiveness in that role that the government interest must prevail over her speech interest." 956 F.2d at 1051.

In Connick the Supreme Court reversed, holding that because Myers's speech was principally concerned with a private grievance rather than with a matter of public concern, it was not entitled to as much protection as the employees' speech in Pickering v. Board of Education, 391 U.S. 563, 20 L.Ed. 2d 811, 88 S.Ct. 1731 (1968), and Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274. The Court's premise was that:

> The First Amendment was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people. With regard to the speech that was not of public concern, the Court's position was that, absent very unusual circumstances, the federal Court's position was that, absent very unusual circumstances, the federal courts should not be reviewing personnel decisions.

With regard to the speech that the court considered to be of public concern, the court concluded that under the facts of the case, the district attorney's interest in maintaining the efficiency of the office outweighed Myer's free speech interest.

Crandon presents to this Court that the case at bar does have very unusual circumstances that Crandon prays this Court to review.

In Crandon, the Kansas Supreme Court found that Crandon's speech was a matter of public concern. Crandon 897 P 2d. at 102. [Appendix p. 11.] But, because Crandon did not first go the Dunnick, the head of the agency that the respondent could fire Crandon because of the principle in

Connick, about "maintaining the efficiency of the office outweighed Crandon's free speech."

I. c.) The speech in Crandon were inquiries about policy and law to a federal co-regulator: The Connick speech was "mini-insurrection" to the press.

The difference in Connick from Crandon, is that Connick's speech was described in the trial as 'mini-insurrection'. Connick's speech was to the press. The speech in Crandon was inquiries about federal law, regulations and policy to legal counsel for the FDIC, a co-regulator of the state-charted banks in Kansas. The speech in Crandon was inquiries, at the request of Kansas Review Examiner Berggren, to do research on FDIC ethics regulations and policy. [Crandon deposition p. 226-227.] Additionally Crandon was asking about Kansas real property laws as they relate to spouses and the Kansas Doctrine of Necessities for spouses. [Crandon deposition p. 226-228.] The Connick speech was private speech: The Crandon speech was a matter of public concern. Crandon 897 P 2d. at 102. [Appendix p. 11.]

Crandon speech was inquiries about federal law as those laws related to a high-ranking Kansas government official to the Regional General Counsel of FDIC Lamberti; and to the Kansas Review Examiner Berggren [Crandon deposition p. 166.] And it was well established that it was her job to give legal advice to the review bank examiners. [Dunnick deposition p. 2. exhibits] [Crandon deposition p. 166.]

Crandon was doing her job to give legal advice to Review Examiner Berggren. [Dunnick deposition p. 2.] She telephoned Regional Counsel for the Federal Deposit Insurance Corporation Gerald Lamberti to inquire about Federal law, regulations and policy regarding bank examiners, extensions and how they relate to spouses of bank examiners. Regional Counsel for the Federal Deposit Insurance Corporation Lamberti testified in deposition that that is part of what his job is. "We [FDIC] also render–give opinions, oral and written, both to the general public and to the Division of Supervision. The great bulk of those are in the deposit insurance area." [Lamberti deposition. p. 6.]

In the Kansas Supreme Court opinion Crandon 897 P.2d at 102-103, [Appendix p. 19.] the court states,

As we view the matter, plaintiff was discharged because she was general counsel for the Office of State Bank Commissioner. The head of the OSBC had been advised of Stork's possible violations, at least as to the bank audit, and had determined there was no violation. He attended a civil service hearing in which plaintiff put Stork on the witness stand to establish that she had not violated any federal or state laws and that no rules, regulations, or internal policies had been violated. Plaintiff argued to the hearing panel that Stork's testimony was that no violation had occurred.

For the Kansas Supreme Court to establish that the plaintiff Crandon "put Stork on the witness stand to establish that she had not violated any federal or state laws and that no rules, regulations, or internal policies had been violated" is an outrageous and a gross over-statement of the facts, over-broad, a mis-statement and a grievous error of law. The Kansas Supreme Court made this finding with no evidence; there was not one page of the transcript of the Emery Civil Service hearing before the trial court or the Kansas Supreme Court.

I. d.) There is no 'efficiency' of the Kansas Banking Commission that is more important than the General Counsel's right to make inquiries about federal laws, policies and regulations from a federal co-regulator the FDIC.
and:
I. e.) No Kansas state interest is more important than a citizen's First Amendment rights to make inquiries into federal law, policies and regulations.

In balancing the State's interests; is it in the best interest of the State of Kansas to protect and soothe the ego and pride of one of its governmental officials? Is Dunnick's embarrassment that it gave the appearance that he did not know what was going on in his own department [Berggren deposition exhibit # 55 p. 21-23.] a State interest, higher than Crandon's First Amendment rights to make inquiries about federal law to her respective legal counsel with a co-regulator? Crandon and Berggren had discussed legal issues and bank exam issues countless other times with their respective components of the FDIC without first discussing it with Dunnick, and that did not embarrass or peeve

Dunnick. Why must the same information go through Dunnick when it is about a high-ranking government official whom Dunnick had appointed to such high-ranking government position?

I. f.) There was no "close relationship and need for trust" that was destroyed by Crandon's inquiries into federal law from the FDIC.

The Court stated in Crandon 897 P.2d at 102-104; Crandon 897 P 2d. at 102. [Appendix p. 20.]

> Plaintiff's position as chief counsel for the organization required a close working relationship with Dunnick. Dunnick relied on Plaintiff for legal advice for his guidance and the for guidance of the organization and its employees. The organization's attorney has a responsibility to give advice when necessary to prevent or rectify unlawful or improper acts of the organization and its employees. This advice must be given by presenting the attorney's opinion to the proper person or persons in the organization who have the authority to correct the problems. A close relationship and need for trust are essential in an attorney's relationship with the organization. Thus a wide degree of deference to Dunnick's decision to terminate plaintiff is appropriate when something occurs to disrupt that relationship and trust.

Crandon, agrees with the Kansas Supreme Court that "a close relationship and need for trust are essential in an attorney's relationship with the organization". However, that is exactly what Crandon had with the Kansas Banking Commission. Crandon was doing an assignment to research federal ethics law as it related to a high-ranking government official in the Kansas Banking Commission, Deputy Commissioner Stork. Dunnick was embarrassed and angry when he found out that Review Examiner Berggren and Crandon had made inquires into the law from the FDIC. What is the trust that was violated?

What is the "close relationship and need for trust are essential in an attorney's relationship with the organization" that Crandon destroyed? These are the facts. 1.) Dunnick knew of the Deputy Commissioner Stork mortgage.

[Berggren deposition exhibit # 55.] 2.) Dunnick lied under oath at the he did not know about the Stork mortgage at the Emery Civil Service hearing. [Transcript of the Emery Civil Service hearing July 6, 1995 at page 54; plaintiff's discovery.]

Q. Okay. Are you acquainted with Judi Stork?
A. She is my deputy commissioner.
Q. What's her current position: Did you say deputy commissioner?
A. Yes, sir.
How long has she been deputy commissioner?
A. I appointed her approximately a year ago, I believe.
Q. Okay. do you know what her father does?
A. Yes. He's in the bank.
Q. Which bank?
A. Baileyville State Bank.
Q. Okay.
A. Of Seneca, Kansas, I believe that's the correct name.
Q. It is a state chartered bank, is it?
A. Uh hun.
Q. And it is under the jurisdiction of your office:
A. That's correct.
Q. And do you know if Miss Stork and her husband own real estate?
MS. CRANDON: Objection, this is beyond the scope of–
A. I mean they live in a house, you know.
Q. (BY Mr. Ebert) If I could be permitted to proceed, do you know if Miss Stork and her husband own real estate:
A. I assume they do.
Q. Okay. Do you know who holds the mortgage on that property?
A. I have no idea. I mean, I don't—
Q. Is it your testimony here before this board that you never– that you do not recall having any discussions with any individual or individuals regarding who holds the mortgage on that property in the past?
A. Why should I?
Q. Just asking you to answer the question, sir.
A. Not that I recall. I mean- - -

Q. That's something that you would recall, however, isn't it?
A. I would think so.
Q. Okay
A. I mean, I don't ask, you know, I don't ask employees where they bank or anything.
Q. You don't?

There may be an issue of a violation of trust, in the Kansas Banking Commission, but that trust was not violated by Crandon. It was Dunnick who lied under oath to that tribunal.

Dunnick knew of the Deputy Commissioner Stork home mortgage and he asked Review Examiner Berggren on Friday July 10, 1992 whether Berggren had told Emery's defense attorney about the Stork home loan.

"Erik said he did not talk with Emery's defense. Erik conveyed that it seemed to be a 'common knowledge' item among the field examiners." [Berggrens deposition exhibit # 55 Eric's notes; p. 22. Friday 7-10-92.]

Review Examiner Berggren had told Crandon that he had discussed the matter of the loans of the high-ranking government official with Dunnick. [Berggren deposition exhibit # 55.] That was the job of the Review Examiner, to discuss bank examination matters with Dunnick; that was not the duty of Crandon. Review Examiner Berggren asked Crandon to research issues of federal ethics laws. Crandon had called Regional Counsel for the Federal Deposit Insurance Corporation Lamberti about questions of law and policy about other issues; not involving a high-ranking government official and she did not get fired for doing that.

ISSUE II. Do all attorneys lose their First Amendment right to freedom of speech when they accept employment for the State of Kansas?

This case is important to the eight hundred thousand [804,000] citizens of the United States of American are licensed to practice law [according to the 1990 U.S. Census]. Ten point fifty-four percent (10.54%) of those practicing law are employed in government service; that is more than eight-thousand [80,000] attorneys working for federal, state and local governments. The Supreme Court of Oklahoma ruled in State of Oklahoma v. Porter, 766 P.2d 958,(1988);

> Foreclosing the right of an attorney to criticize the court is thus not only a burden on the speaker's First Amendment right but also upon the public's First Amendment right to hear what he has to say. Without question, foreclosing the public's receipt of speech concerning the governmental function of the courts forestalls the public's access to the thoughts of the very class of people in daily contact with the judicial system. [766 P.2d at p. 967].

If all legal inquiries must be censored by the head of the agency; Where is the check and balance on the high-ranking Kansas state governmental officials in the Kansas Banking Commission? Is that truly a governmental interest for the State of Kansas sufficiently imperative to justify an attorney's First Amendment rights, when the attorney was doing an assignment given to her by the State Banking Commission Review Examiner?

Id. at 958, an attorney criticized a U.S. District judge, that Supreme Court of Oklahoma stated in regard to that attorney's First Amendment Right of freedom of speech,

> Where prohibition is directed at speech itself, self-government, the State may prohibit speech only upon showing compelling interest which subordinates right of speaker to speak and public to hear speech. And if the State has compelling state interest to prohibit speech, means chosen to further interest of State in prohibiting speech must be narrowly tailored to avoid unnecessary abridgment of right of free speech.

II. a.) Crandon was fulfilling her duty as General Counsel to the organization by doing legal research on an issue that Review Examiner Berggren presented to her.

The Kansas Supreme Court in its decision affirming the Shawnee County District Court's granting of summary judgment Crandon 897 P 2d. at 102-104 [Appendix p. 21.] states:

> "The trial court in general held that an organization's general counsel has obligations different than those of other employees. In using the balancing test discussed below, an attorney's obligation (as general counsel) is first and foremost to the organization. The balancing test as applied

here includes the factors that general counsel reported a suspected violation or violations to an outside agency without first consulting with the head of the organization and that had she done so she would have learned that no violations had occurred. Whether plaintiff violated the Model Rules of Professional Conduct is not the determinative factor, and in fact a finding of no violation can be of no comfort to her.

Crandon was fulfilling her obligation to the organization i.e. Kansas Banking Commission by researching federal ethics laws and policy an assignment given to her by Kansas Bank Review Examiner Berggren. [Crandon deposition 268].

It must be made clear that Crandon was doing her job [Crandon deposition 167, 198.] She was inquiring about federal law and policy as it related to state bank examiners and a high-ranking governmental official. [Lamberti deposition p. 37.]

Review Examiner Berggren was calling the FDIC Review Examiners with questions of law. [Berggren deposition exhibit # 55.] Dunnick may have interrupted this as an internal investigation however that interpretation was incorrect. [According the Regional General Counsel for the FDIC Lamberti deposition p. 37.]

Q. Do you have any evidence that Joyce Crandon did not have a good faith belief when you were talking to her that she was reporting a violation of the law?

A. Do you– are you saying-- are you asking me did I think she was reporting a violation of Section 213 to me? [Lamberti deposition. p. 37.]

Q. (BY MR. GOTT) No. I'm asking you when she was telling you this, was she doing it in a good faith or did you feel that she was doing it in good faith? [Lamberti deposition. p. 37.]

MS. ULRICH: Doing what, reporting?

MR. GOTT: Yes, the reporting.

MS. ULRICH: I object to the form of the question. I don't think there's been evidence that there was a reporting or I don't think Mr. Lamberti has testified that he was reported to about anything. [Lamberti deposition. p. 37.]

A. Yeah, I– the good faith part I have no idea about. This was not reporting to me on anything. This was a typical conversation where my brain was being picked, I thought. What do you think about this, what do you think about that, was the tenor of conversation. This wasn't someone who was picking up the phone and saying this bank is cheating me on this or so and so is cheating me on that or– that wasn't the tenor of the conversation to my recollection. It was– what do you think about this: It wasn't a reporting of anything. [Lamberti deposition. p. 38.]

Crandon called FDIC Regional General Counsel Lamberti one time in June to discuss federal law 18 U.S.C. §213 and related policy. [Crandon deposition p. 232 and 240.] Crandon was "asking that was my question, whether proceeds of the loan--you know clear it up in my mind exactly more clear in my mind, and he made it more clear in my mind" [Crandon deposition p. 232-233.]

II. b.) The State of Kansas does not have an interest sufficiently imperative to justify restriction of the First Amendments rights of one of its special assistant attorney general's to question the federal authorities about federal law as it related to a high ranking governmental official in the Kansas Banking Commission.

Is the best interests of the citizens of the State of Kansas for an attorney, employed to give legal advice to bank examiners; be fired from her job because she made 'inquiries about federal law to the FDIC, a co-regulator of Kansas Banks but the facts supporting the inquiries were about a high-ranking government official? The Kansas Supreme Court discussed that the district court found that no reasonable attorney in plaintiff's shoes could perceive the conduct of the defendant [5]; as the basis for an out-of agency report at the time it was made. The trial court found that plaintiff's report was made with reckless disregard for

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5 Even though the courts uses the word defendant ; it was not Dunnick or the State of Kansas that Crandon was making inquires about .

its truth or falsity and that she released information which was confidential under the Model Rules of Professional Conduct. However, there was absolutely no evidence to support this finding.

The following is what Crandon knew: 1.) that Deputy Commissioner Stork had personally examined the Southwest Bank and Trust. [Crandon deposition p. 260.] 2.) That Southwest Bank and Trust was listed as the lien holder on the vehicle that Deputy Commissioner Stork drove to work every day and that Deputy Commissioner Stork was listed along with her husband as owner of the vehicle. This information she relayed to Regional General Counsel for the FDIC Lamberti when inquiring whether 18 U.S.C. §213 which prohibited bank examiners from getting loans from banks that they have examined. These are all of the facts are the truth supported by copies of documents that are a matter of public record in the State of Kansas.

It needs to be noted here that both Crandon, and Review Examiner Berggren sought advice and counsel from their respective components in the FDIC. Neither went to the top of the FDIC, to inform Pritchett, the Kansas Regional Director for the FDIC. Making inquires about banking issues was in the ordinary course of events for bank examiners. Many times the FDIC called the Kansas Banking Department with questions of law on various bank exams. [Berggren deposition exhibit # 55.]

Both Crandon and Berggren had made inquiries about banking laws and regulations to the FDIC before: [Berggren deposition exhibit # 55.] Why, did Crandon have to first consult with the head of the agency, on this occasion, or risk losing her job?

In balancing the State's interests; is it in the best interest of the State of Kansas to protect the ego and pride of one of its high-ranking governmental officials? Just because Dunnick was upset embarrassed and "peeved at Review Examiner Berggren and Crandon"; was that sufficient State's interest for the Kansas Supreme Court to affirm the trial courts granting summary judgment in the case at bar?

In Johnston v. Koppes 850 F.2d 594, Ninth Circuit, (1988), another case where a government lawyer brought a 42 U.S.C. §1983 action against department head alleging that the lawyer had been improperly

disciplined for asserting her First Amendment rights, the issue of material fact as to whether department head was justified in disciplining government lawyer for her exercise of First Amendment rights precluded summary judgment for department head on his claim of qualified immunity. Further the Johnson court ruled that the department head did not act in good faith in disciplining government employee for exercising her First Amendment right, though department head had sought advice of lawyer, where lawyer was a subordinate of department head, advice was sought after disciplinary action had been taken, and advice did not address employee's constitutional rights at 850 F.2d 596.

Further Id.,

> . . . the attorney for an agency attended a hearing which was "favorable to public funding for abortion". The department head was "embarrassed" by the attorney's presence. The department head 'disciplined' the attorney. Johnson the attorney filed the 42 U.S.C. §1983 cause of action in federal district court. Further that court ruled as to summary judgment that "the non-moving party prevails if that party makes "a showing" sufficient to establish the existence of the elements of her case on which she bears the burden of proof, citing Celotex Corp. v. Catrett, 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

Crandon has made such a showing establishing the existence of the elements of her case and she prays this court to accept her petition for writ and remand this matter back to the trial court for a trial on the merits.

> "Public employees may not be terminated on a basis which infringes upon the employee's constitutionally-protected interest in freedom of speech." Rankin v. McPherson, 483 U.S. 378, 107 S.Ct. 2891, 2896, 97 L.Ed.2nd 315 (1987); Connick v. Myers, 461 U.S. 138, 142, 103 S. Ct. 1684, 1687, 75 L.Ed. 2d 708 "the exercise of constitutional rights is well-established in the law, and any public official cannot bet the Court's indulgence in his ignorance." Perry v. Sidermann, 408 U.S. 593, 92 S.Ct. 2694, 33 L.Ed. 2d 570 (1972).

The Court in Sidermann stated:

> For at least a quarter-century, this Court has made clear that even though a person has no "right" to a valuable government benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. It may not deny benefit to the person on the basis that infringes his constitutionally-protected interest--especially his interest in freedom of speech. For if a government could deny a benefit to a person because of his Constitutionally-protected speech and associations, his exercise of those freedoms would in effect be penalized and inhibited. This would allow the government to "produce a result which [it] could not command directly." Such interference with Constitutional rights is impermissible. Perry v. Sidermann. 408 U.S. at 597, 92 S.Ct. at 2697.

Crandon requests the Court to echo the Court's admonishment that "speech concerning public affairs is more than self-expression; it is the essence of self-government." Garrison v. Louisiana. 379 U.S. 64, 85 S.Ct. 209, 215-216, 13 L.Ed. 2d 1225 (1964). Further, Id.

> The Court has frequently reaffirmed that speech on public issues occupies the 'highest rung of the hierarchy of the First Amendment values', and is entitled to special protection.

N.A.A.C.P. v. Claiborne Hardware Co., 458 U.S. 886, 913, 120 S.Ct 3409, 3426, 73 L.Ed. 2d 1215 (1982); Carey v. Brown. 447 U.S. 455, 467, 100 S.Ct. 2286, 2293, 65 L.Ed. 2d 263 (1980).

> Whatever differences exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner which government is operated or should be operated, and all such matters relating to the political process Mills v. Alabama, 384 U.S. 218-219, 86 S.Ct. at 1436-37. See also Arnett v. Kennedy, 416 U.S. 134, 228, 94 S.Ct. 1633, 1680 40 L.Ed. 2d 15 (1974)

(Marshall, J. dissenting) (Describing "the importance of Government employees' being assured of their right to freely comment on the conduct of Government, to inform the public of abuses of power and of misconduct of their superiors. . . . ") Connick v. Myers 461 U.S. at 162, 103 S.Ct. 1684.

II. c.) The elements for cause of action under 42 U.S.C. § 1983 are stated.

In citing Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, the Tenth Circuit in Johnson v. Independent School District No. 3, 891 F.2d 1485 (10th Cir. 1989), set forth the elements an employee must show to sustain a claim that her public employer violated her rights of free speech:

> The Supreme Court in Mt. Healthy City School Dist. Bd. of Education v. Doyle, 429 U.S. 274, 97 S. Ct. 568, 50 L.Ed. 2d 471 (1977), set out a three-pronged test to determine whether an adverse employment decision violates a public employee's First Amendment right to free speech. Under that test a public employee must first show that, as a matter of law, his or her speech was constitutionally protected. Id. at 284, 97 S.Ct. at 574. Second, the employee must demonstrate that the protected speech was a substantial or motivating factor in the adverse employment discussion. Id. at 287, 97 S. Ct. at 576. Finally, the burden shifts to the employer to show by preponderance of the evidence that the employer would have made the same decision even in the absence of the protected speech. Id.
> Johnson v. Independent School, 891 F.2d at 1489-1490. See also Powell v. Gallentine, 992 F. 2d 1088 (10th Cir. 1993); Melton v. City of Oklahoma City, 879 F.2d 706 (10th Cir. 1989); Conoway v. Smith, 853 F.2d 789 (10th Cir. 1988).

The right to make statements critical of public officials has long been recognized as protected under the First Amendment. Wulf v. City of Wichita, 644 F.2d 842 (10th Cir. 1989). The federal district court in Wulf at p. 842 [a case from the federal district court in Kansas] stated:

> An employee who accurately exposes rampant corruption in her office no doubt may disrupt and

demoralize much of the office. But it would be absurd to hold that the First Amendment generally authorizes corrupt officials to punish subordinates who blow the whistle simply because the speech somewhat disrupted the office. Porter v. Califano, 592 F.2d 770, 773-74 (5th Cir. 1979). If a public employee were to be deprived of the right to make critical statements about the manner in which governmental agencies were operated because of fear of provoking the dismissal, the public would be deprived of valuable information with which to evaluate the performance of its officials, whether elected or appointed. Protecting the dissemination of such information is an essential function of the First Amendment. Connick v. Myers, 103 S. Ct. at 1702 (Brennan, J., dissenting).

The Kansas court correctly found that the speech of Crandon, with the FDIC and State Banking Department Review Examiner Berggren were matters of sufficient public concern. Crandon 897 P 2d. at 98. Crandon's speech concerning public official crimes, misconduct and impropriety are considered "public" concern as a matter of law.[6] Conoway 853 F.2d at 796. Likewise, the Kansas court properly concluded that, although based upon disputed facts, sufficient evidence was presented that her speech was a motivating factor for her termination. Crandon 897 P 2d. at 98.

No evidence was produced to support the Kansas court's Pickering balancing test decision.

The third element in a public employee's First Amendment case is that the court must balance the interest of the employee in making the statement against the public employer's interest in the efficient and effective fulfillment of its responsibilities to the public. Pickering v. Board of Education, 391 U.S. 563, 568,, 88 S.Ct. at 1731, 1734, 20k L.Ed. 2d 811 (1968). Johnson v. Independent School, 891

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6 Respondent may erroneously argue that Crandon's speech is not protected, alleging factual error , that her conclusions were wrong. Powell, 991 at 1091. Crandon's speech is protected irrespective of whether her statements were true or false. Id., citing Pickering, 391 U.S. 578-82, 88 S.Ct. at 1740-42.

F.2d 1489-90. The district court erred in making its Pickering balance determination without evidence as to the effect, if any, of Crandon's speech. Powell, 992 F.2d at 1091, citing Conoway, 853 F.2d at 797, and Melton, 879 F.2d at 716.

II. d.) Dunnick, respondent is unable to establish Pickering balance in their favor as a matter of law.

The record is silent of any evidence that Crandon's speech had a disruptive effect upon the efficient and effective operation of the Kansas Banking Commission and it's ability to provide services to the public. How could Crandon's speech have had a disruptive effect upon the efficient and effective operation of the Kansas Banking Commission and it's ability to provide services to the public? Dunnick found out on Thursday and fired Crandon the following Monday morning? "Only when citizens advocate imminent, lawless action can the state lawfully intervene to suppress political dissent", see Brandenburg. v. Ohio, 395 U.S. 444, 447 (1969).

The Kansas court relies on supposition to determine that the balance weighed in favor of Crandon's termination. Its erroneous conclusion that the information exchanged with the FDIC and Berggren was confidential and in contravention of the attorney-client privilege is the genesis of the district court's ill-conceived conclusion. Goffer v. Marbury, 956 F.2d 1045 (11th Cir. 1992) (breach of attorney-client privilege, if any, only a factor and does not override free speech.). As demonstrated earlier, Crandon had no attorney-client relationship with Deputy Commissioner Stork, the information was not confidential to the Kansas Banking Commission or breach in attorney-client privilege. Without evidence of actual disruption of the Kansas Banking Commission services, the respondent loses the Pickering test as a matter of law. Powell, 992 at 1091.

Dunnick is unable to meet its high burden of showing that Crandon's termination and subsequent restriction is necessary to prevent actual disruption in the official functions or to ensure the effective performance of the Kansas Banking Commission to the public. Powell, 992 F.2d at 1091. See also Wren v. Spurlock, 798 F.2d 1313, 1318 (10th Cir. 1986); Schalk v. Gallemore, 906 F.2d 491, 494 (10th Cir. 1990). This Court must find the employer's action

unconstitutional unless the employer demonstrates in the record that the action was necessary to the effective performance of the employer or the employee. Luethje v. Peavine School District of Adair County, 872 F. 2d 352, 355 (10th Cir. 1989); Ware v. Unified School Dist. No. 492, 881 F.2d 906, 910 (10th Cir. 1989). Mansour v. Abrams, 151 Misc. 2d 121, 573 N.Y.S. 2d 364 (1991) (assistant attorney general criticism of internal policies states cause of action and defeats summary judgment).

It is not sufficient for Dunnick or the Kansas Supreme Court to allege or suppose that "some disruption" will occur. Schalk v. Gallemore, 906 F.2d at 496. The Gallemore court acknowledged that such arguments have some appeal. Id. However, the Kansas Supreme Court commits reversible error without compelling the State to demonstrate undisputed material facts that show "actual evidence" of the disruption and impact on the Kansas Banking Commission. Powell, 992 F.2d at 1091; Gallemore, 906 F. 2d at 496. Dunnick discovered that Crandon had spoken with and made inquiries with the FDIC on Thursday, July 9, 1992, and she was terminated the following Monday. No such evidence can exist.

The difficulty, and flaw, if you will, with the Kansas Supreme Court's conclusion that Crandon's speech is an impairment of the Kansas Banking Commission's "effective and efficient fulfillment of its responsibilities" is that there is no evidence to support the court's determination. Its guesswork that the relationship between Crandon and the Kansas Banking Commission would be damaged is of no moment. City of Houston v. Hill, 482 U.S. 451, 107 S.Ct. 2502, 96 L.Ed. 2d 398 (1987):

> If absolute assurance of tranquillity is required, we might as well forget about free speech. Under the requirement, the only "free" speech would consist of the platitudes. That kind of speech does not need Constitutional protection.

City of Houston, 107 S.Ct. at 2510, F. N. 11 (quoting Spence v. Washington, 418 U.S. 405, 416, 94 S.Ct. 2727, 2733, 41 L.Ed. 2d 842 (1974) (Douglas, J., concurring).

Likewise, bald conjecture of breaches of loyalty and confidence, particularly without reference to the record, do

not support the Pickering balance in favor of the defendants.

Crandon respectfully submits to this Court that the respondent failed to affirmatively set forth the evidence sufficient to demonstrate that the Pickering balance weighs in their favor as a matter of law. Powell, 992 F.2d at 1091. Moreover, the Kansas Supreme Court cannot rely upon its own supposition in argument to support the Pickering balance. As such, under controlling authority this Court should remand the action back to the Shawnee County District in Kansas for a trial on the merits with the holding that Crandon prevails on the Pickering balance as a matter of law.

The court states that factors that general counsel reported a suspected violation or violations to an outside agency without first consulting with the head of the organization and that had she done so she would have learned that no violations had occurred. That is not what the evidence produced at discovery That is not what discovery revealed in the case at bar. Even FDIC Regional General Counsel Lamberti stated that "I frankly don't know. I mean I don't know about enough of the facts of the situation to have an opinion one way or the other. . . "
[Lamberti deposition. p. 6.]
Lamberti was asked by Dunnick;

> Q. Would that regulation apply to the situation Ms. Crandon described to you at the Bank Commissioner's office?
>
> A. I frankly don't know. I mean I don't know about enough of the facts of the situation to have an opinion one way or the other. . .

However when Regional General Counsel for the FDIC Lamberti was questioned and given more of the facts by counsel for the plaintiff in his depositions he stated,
[Lamberti deposition p. 36.]

> Q. (BY MR. GOTT) Okay, Mr. Lamberti, and that's fair enough and I'll do that. You have a family owned bank and the supervisor is connected with that bank and one of the siblings who is with that bank and one of the siblings who is working in that bank contacts the supervisor and expresses concern that the supervisor's subordinates, i.e. the field examiners, are examining her

loan or his loan and the field examiner is promptly removed from that examination. Would you find anything improper with that?
MS. ULRICH: Again, I object the form of the question. There's no foundation. Those facts are nowhere in evidence in this deposition or in this case.
A. Would I find anything wrong with it?
Q. (BY MR. GOTT) Yes.
A. Yeah, it sounds to me like there's something going on here that maybe needs to be looked into, but I don't think it's a violation of Section 213, if that's what you're asking me.

ISSUE III. Whether the Kansas Supreme Court erred in affirming the district court's granting summary judgment when there were disputed material facts?

Material issues of fact preclude district court from ruling Crandon used poor judgment and did not take steps available to her that a reasonable prudent attorney would have taken prior to inquiring about what she suspected to be violations to the FDIC. "Reasonable" is a question of fact for the jury to decide.

The Kansas Supreme Court opinion continues at Crandon 897 P 2d. at 102-104 [Appendix p. 21].

> The OSBC head then attended a meeting with FDIC officials involving other matters and he learned for the first time that plaintiff had twice reported possible violations (once prior to the civil service hearing and a second time either immediately preceding or immediately after the panel hearing, based on largely different facts) to the FDIC without checking facts that were available to her which would have changed a reasonable attorney's mind. Whether the second reporting by plaintiff to the FDIC occurred before or after the panel hearing is not clear. The panel hearing was held on July 6 and the second telephone call reporting the alleged violations occurred (according to plaintiff's testimony) the first week in July.

A question for this tribunal--How can the Kansas Supreme Court determine on summary judgment 'what facts would have changed a reasonable attorney's mind'? How can any tribunal determine what facts would change a

reasonable attorney's mind without a hearing by a trier of facts to determine what all the facts were to a "reasonable attorney's mind"? This is a factual issue for the jury to decide.

There are disputed facts as to the issue of whether Crandon knew that Deputy Commissioner Stork had examined Southwest Bank and Trust. Crandon stated in depositions that she did know this. [Crandon deposition p. 260.] That Deputy Commissioner had examined Southwest Bank and Trust was never denied by Dunnick. It is uncontroverted that Deputy Commissioner Stork examined Southwest Bank and Trust; yet the Kansas Supreme Court states in Crandon, 897 P.2d at 98. [Appendix p. 9-10.] "Plaintiff proffers no evidence existing at the time of her report to support her assertion that Stork had unlawfully examined the Southwest Bank and Trust." These are disputed material facts.

Pursuant to Celotex v. Catrett 106 S.Ct. 2548, 91 L.Ed. 2d 265, 477 U.S. 317 (1986), the Court, held that:

> (1) Rule 65 (c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment.
>
> Additionally pursuant to Celotex, "Where party will have burden of proof on an element essential to its case at trial and does not, after adequate time for discovery, make a showing sufficient to establish the existence of that element, there can be no genuine issue as to any material fact since a complete failure of proof concerning an essential element of the nonmovant's case necessarily renders all other facts immaterial.

Crandon has come forward with a prima facia case sufficient to be entitled to present her case to a jury.

Crandon has demonstrated that there the Kansas Supreme Court affirmed the district's court summary judgment based on an opinion that conflicts with Waters, supra and Connick, supra.

Additionally the plaintiff has demonstrated that summary judgment was granted based on disputed material facts. Only a trial to a jury will bring out all the facts in this important case for all attorneys in government service.

CONCLUSION

For the foregoing reasons this petition for writ of certiorari should be granted.

Respectfully submitted

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Kansas Supreme Court # 08914
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Wichita, KS 67202-1816
316-263-0505

Dated this 28 day of November, 1995.

IN THE SUPREME COURT OF THE STATE OF KANSAS

No. 71,138

JOYCE H. CRANDON,
Appellant,

v.

STATE OF KANSAS, KANSAS BANKING COMMISSION,
and FRANKIE D. DUNNICK,
Appellees.

SYLLABUS BY THE COURT

1.

Attorneys have an employee-employer relationship different than that of other employees, and their conduct is measured by a different standard.

2.

The balancing test set forth in *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), weighs an employee's First Amendment rights against the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.

3.

When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgement is appropriate. The existence of an attorney-client relationship also bears on whether a close relationship which gives rise to a wide degree of deference to the employer's judgement is present.

4.

Whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a question of law and is subject to de novo review.

5.

Defining an attorney's role with an organization is prerequisite to addressing whether the attorney's speech on a matter of public concern so destroyed the attorney's effectiveness in that role that the government interest must prevail over the attorney's speech interest.

Appeal from Shawnee district court; FRANKLIN R. THEIS, judge. Opinion filed June 2, 1995. Affirmed.

Alan L. Rupe, of Rupe & Girard Law Offices, P.A., of Wichita, argued the cause, and *Thomas L. Steele*, of the same firm, was with him on the briefs for the appellant.

Carl A. Gallagher, assistant attorney general, argued the cause, and *Nancy L. Ulrich*, assistant attorney general, and *Robert T. Stephan*, attorney general, were with him on the brief for the appellee.

Mark F. Anderson, of Topeka, was on the brief for *amicus curiae* The Disciplinary Administrator of Kansas.

Jim Lawing, of Wichita, was on the brief for *amicus curiae* American Civil Liberties Union of Kansas.

The opinion of the court was delivered by

ABBOTT, J.: Plaintiff Joyce Crandon brought this action after she was discharged from her position as general counsel for the Office of the State Banking Commissioner (OSBC). Plaintiff had reported to the FDIC alleged violations of federal and state law

committed by the Deputy Commissioner, Judi Stork. Plaintiff alleged a common-law whistle-blowing retaliatory discharge claim, a claim for violation of K.S.A. 1994 Supp. 75-2973, and a 42 U.S. C. § 1983 (1988) claim for violation of her First Amendment right to free speech. Plaintiff later sought to amend her complaint to include a free speech retaliatory discharge claim. The trial court granted the defendant's motion for summary judgment. Plaintiff appealed, and the case was transferred to this court from the Court of Appeals.

The trial court found the following undisputed facts:

> "Ms. Crandon carried the title of general counsel to the office of the state bank commissioner [defendant Dunnick] and had the status of an assistant attorney general. She began upon her duties on November 18, 1991. Her position was in the unclassified civil service. See, K.S.A. 75-3135; K.S.A 75-2935(1)(j) and (m). As such, she had no tenure and was an 'at will' employee. Compare, *Riddle v. City of Ottawa*, 12 Kan. App. 2d 714, 716-19 (1988), pet. rev. den., 243 Kan. 780 (1988).
>
> "...[I]t is the state bank commissioner who has the principal authority under K.S.A. 9-1701 et seq. to execute the laws and to examine and regulate banks.
>
> "...The state bank commissioner is appointed by the governor and confirmed by the State Senate. It is the bank commissioner's duty to administer the state's banking laws.... Further authorized is a deputy commissioner appointed by the commissioner. The Deputy Commissioner is in the unclassified civil service and enjoys no tenure, but serves at the pleasure of the state bank commissioner. See, K.S.A. 75-3135.
>
> "The remaining staff of the agency, exclusive of clerical personnel, consists of individuals holding office and authority as 'examiner's whose duties involve actual performance of, or supervision of, examinations of state chartered banks. All these personnel, as well as clerical staff, hold positions in the state classified civil service system,

meaning they are not subject to dismissal without cause. See, K.S.A. 75-3135; 75-2935(2).

"It was the duty of Ms. Crandon to act as the legal advisor to, and attorney for, this agency. Beginning approximately April to May 1992, one of the review examiners, Erik Berggren, became aware that the Deputy Commissioner, Judi Stork, who had held appointment in the agency since 1981, first as an examiner and subsequently, at the time in question, in the position of deputy commissioner, could be considered to have existing loans from two state charted banks, the State Bank of Baileyville, also a bank in which her financial disclosure statement filed pursuant to K.S.A. 46-247 et seq. disclosed she had a 'substantial interest', and from the Southwest Bank and Trust in Topeka.

"One loan from the State Bank of Baileyville consisted of a note signed only by her husband, but the resulting mortgage on her home was signed by both [her] and her husband. Other loans consisted of a series of overdrafts on a personal checking account she held with that bank. Another loan existed at the Southwest Bank and Trust upon which, although Mrs. Stork was not a signatory to the loan documents, the collateral, a car, was titled in the name of she and her husband, he being the sole signatory on the loan. For the purposes here it is not necessary for the court to determine whether, in fact, Mrs. Stork was a loan recipient in each circumstance, however, for the purpose of defendants' motion the court shall presume in each instance she was a loan recipient.

"...Mr. Berggren believed that such loans placed Mrs. Stork not only in violation of the agency's own internal written ethics code, but also constituted a violation of state and federal banking laws.

"In this regard, K.S.A. 9-1701(a) provides:

> 'the commissioner or the commissioner's assistant or examiners shall visit each bank and trust company at least once every 18 months, and may visit any

bank or trust company if the commissioner deems it necessary, for the purpose of making a full and careful examination and inquiry into the condition of the affairs of such bank or trust company. For such purpose the commissioner, the commissioner's assistant and examiners are authorized to administer oaths and to examine under oath the directors, officers, employees and agents of any bank or trust company. Such examination shall be reduced to writing by the person making it and such person's reports shall contain a full, true and careful statement of the condition of such bank or trust company. The commissioner in lieu of making a direct examination and inquiry may accept the examination and report of an authorized federal agency. The commissioner shall provide to the board of directors of the bank or trust company a copy of the examination report written by the state examiners. Neither the commissioner, the commissioner's assistant nor any examiner shall examine any bank or trust company in which the person making such examination is a stockholder or is otherwise financially interested or to which bank or trust company or any officer thereof the person making the examination is indebted.' (Emphasis supplied.)

"Also noted is 18 U.S.C. 213 which provides: 'Whoever, being an examiner or assistant examiner of member banks of the Federal Reserve System, financial institutions the deposits of which are insured by the Federal Deposit Insurance Corporation, which are branches or agencies of foreign banks (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978 [12 USCS Sec. 3101(1), (3)]), or which are organizations

operating under section 25 or section 25(a) of the Federal Reserve Act, or a farm credit examiner or examiner of National Agriculture Credit Corporations, or an examiner of small business investment companies, accepts a loan of gratuity from any bank, branch, agency, corporation, association or organization examined by him or from any person connected therewith, shall be fined no more than $5,000 or imprisoned not more than one year, or both; and may be fined a further sum equal to the money so loaned or gratuity given, and shall be disqualified from holding office as such examiner.' (Emphasis supplied.)

"Further, to be noted, as it will be addressed subsequent, is 12 U.S.C. 1289, as amended, as here relevant:

'(a) Prohibition

(1) In general

Except with the prior written consent of the Corporation--

(A) any person who has been convicted of any criminal offense involving dishonesty or a breach of trust, or money laundering or has agreed to enter into a pretrial diversion or similar program in connection with a prosecution for such offense, may not--

(i) become, or continue as, an institution-affiliated party with respect to any insured depository institution;

(ii) own or control, directly or indirectly, any insured depository institution; or

(iii) otherwise participate, directly or indirectly, in the conduct of the affairs of any insured depository institution';

"Further, in reference to the above statute, the phrase 'institution affiliated party' is defined in 12 U.S.C. 1813(u), as here relevant as follows:

'(1) any director, officer employee, or controlling stockholder (other than a bank holding company) of, or agent for, an insured depository institution;

...

(3) any shareholder (other than a bank holding company), consultant, joint venture partner, and any other person as determined by the appropriate federal banking agency (by regulation or case -by-case) who participates in the conduct of the affairs of an insured depository institution;

...

"Subsequent, probably in April to May or June 1992, Mr. Berggren first brought his concerns to Ms. Crandon's attention. Further, this underlying factual situation concerning Mrs. Stork became a part of a civil service hearing in a termination proceeding initiated by the Commissioner regarding an employee (not related to this case) that had been appealed by the employee examiner to the state civil service board at which Ms. Crandon appeared in defense of the agency action. The employee had been terminated based on her conviction for violating 18 U.S.C. 213. The issue at note arose from an apparent 'what's good for the goose is good for the gander' defense claiming that Mrs. Stork had loans with the state chartered banks and she was not terminated. The terminated employee was reinstated by the civil service board. This hearing was on July 6, 1992. Ms. Crandon had argued before the Kansas civil service board that Mrs. Stork was not in violation of any such laws and the circumstances were not comparable...

"Mrs. Stork's circumstance was also raised by state bank examiners as a part of the regular examination of the State Bank of Baileyville on going circa this same period. At one point in June 1992, and again the week of July 6, 1992, Ms. Crandon made, on each occasion, a phone inquiry to the Federal Deposit Insurance Corporation regional office in Kansas City, specifically, to Mr. Lamberti, its regional counsel, whether in his view Mrs. Stork's

circumstances were in violation of federal law, specifically 18 U.S.C. 213. Mr. Lamberti subsequently has testified that he did not perceive a violation, but that such an issue was an internal one for the state agency. Admittedly, he said his response was ad hoc and without research. Notwithstanding, in considering defendants' motion the court will consider Mr. Lamberti's response as sufficiently ambivalent such that plaintiff might believe his response at least left a question raised as to the violation of federal law.

"Sometime during the week of July 6, 1992, Ms. Crandon advised Mr. Berggren to turn the matter over to the FDIC, which he did. Mr. Berggren has testified he would have done so in any manner notwithstanding any advice of Ms. Crandon.

"Subsequently, and for the purpose of the motion and taken as true, Commissioner Dunnick learned at a meeting with the FDIC on July 9, 1992, of Mr. Berggren's reporting to the FDIC, Ms. Crandon's advice to him to do so, and her inquires to Mr. Lamberti.

"At no time prior to her termination, except during questioning at the civil service hearing on July 6, 1992, had Mrs. Stork and Mr. Dunnick were called as witnesses, had Ms. Crandon personally talked with Mr. Dunnick or Mrs. Stork about Mrs. Stork's status vis a vis the identified loans and whether Mrs. Stork's loan circumstances violated federal or state banking laws, state ethics statutes, or internal agency ethics policy.

"At no time prior to Ms. Crandon's termination did Ms. Crandon attempt, in any manner, to persuade Mr. Dunnick, as the agency's head, that he should affirmatively act in some fashion under his authority as Commissioner to remedy the situation she believed was presented arising from the fact of Mrs. Stork's loans.

"Ms. Crandon asserted through counsel at oral argument in this case that she made one phone call to the attorney general's office and was told they don't give opinions on criminal matters. The person called is not identified.

"There is no evidence Ms. Crandon contacted any member of the banking board or the Governor's office before her termination.

"For the purpose of the motion, it is assumed Mr. Berggren told Ms. Crandon that he had discussed the loans with Mrs. Stork and that he had brought them to the attention of Commissioner

Dunnick who said he would look into it. The conversations between Berggren, Stork, and Dunnick probably occurred prior to May 27, 1992.

"Whether Ms. Crandon knew Mrs. Stork had told Mr. Berggren she had never had authority to examine the State Bank of Baileyville since she first came to the agency or that Mrs. Stork had closed her checking account at the State Bank of Baileyville is unclear. However, she did not know that Mrs. Stork had replied to the inquiries by memo to the commissioner. Notwithstanding, these facts could have been confirmed by agency documents or official inquiry to the bank. Ms. Crandon did not see these documents and the response of Mrs. Stork to inquiries posed to her as to her authority to examine the State Bank of Baileyville when she was a witness, under oath, in the Emery civil service hearing were that she had no such authority. Ms. Crandon knew from Mr. Berggren that Commissioner Dunnick had reviewed the matter by June 1, 1992, and had concluded Mrs. Stork's situation violated no state policy, but she did not know the basis for his decision except for what she may have learned at the civil service hearing.

"Further, no evidence has been proffered by the plaintiff that she had any other source of factual information to form any opinion that Mrs. Stork's loans were in violation of any law or policy other than by talking to Mr. Berggren or to Mr. Lamberti, except to confirm by inspection at the Record of Deeds' office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. And Mrs. Stork's name and to confirm title to the motor vehicle subject of the loan and lien of Southwest Bank and Trust was likewise in their names. Plaintiff is unable to say what, if any, case law she reviewed prior to any advice to Mr. Berggren or used in the formulation of any opinion of wrongdoing other than *St. Francis Hospital v. Browles*, 251 Kan. 334 (1992), which explains the doctrine of necessaries vis a vis one's spouse's liability for the debts incurred by the other. The statutes or regulations upon which she stated she relied were K.S.A. 9-1701, 12 U.S.C. 213, 12 U.S.C. 1289, and 12 C.F.R., part 215.

"Plaintiff proffers no evidence existing at the time of her report to support her assertion that Mrs. Stork had unlawfully

examined the Southwest Bank and Trust or interfered with the examination of the State Bank of Baileyville. Ms. Crandon did state she believed Mrs. Stork had authority to examine any Kansas bank. Ms. Crandon states she investigated whether Mrs. Stork was in violation of 12 U.S.C. 1289 by examining Case 82 CR 234 in the Shawnee County District Court and Mrs. Stork's disclosure of substantial interest statements filed with the Secretary of State, but did not discuss with anyone, but Mr. Berggren, whether Mrs. Stork's prior diversion agreement placed her in violation of federal law because she had an ownership interest in the bank. She undertook no other investigation nor inquiry. There is no evidence the subject matter of her 12 U.S.C. 1289 inquiry was part of any 'whistle-blowing' claim or that Mr. Dunnick knew of it, however, it is accepted by the court as advanced as one motivation by Ms. Crandon for her 'reporting' activity and procedure. Of course, factual information arising after 'reporting' would not be a proper standard to test the reasonableness of her belief at the time of reporting.

"It seems substantially clear and not reasonably subject to material dispute what Ms. Crandon's 'whistle-blowing' and/or 'free speech/public concern' communication claim is alleged to be. It consists of up to two inquiries to Mr. Lamberti of the FDIC concerning loans made to a spouse of what Ms. Crandon represented was a deputy commissioner or 'supervisory examiner' and, for the purpose of this matter, further inquiries and reporting of the circumstances concerning such loans to the FDIC by Erik Berggren which, though encouraged by Ms. Crandon, Mr. Berggren would have proceeded on in such manner in any fashion.

"The plaintiff's claim is that she was terminated by her employer, the state bank commissioner, for this collective 'reporting' to the FDIC."

Defendants moved for summary judgment on all of plaintiff's claims. The trial court granted the defendant's motion. Resolving disputed facts in plaintiff's favor, as the court was required to do, the court found that but for plaintiff's acts of communication to the FDIC, she would not have been terminated. The court also assumed that Commissioner Dunnick was aware of the communications. Central to plaintiff's claims, the court found, was the issue whether the communications were legally protected under the circumstances so as to insulate plaintiff from termination, as issue of law.

In evaluating the issue, the trial court found that the plaintiff had spoken on a matter of public concern. However, the court found that the flaw in plaintiff's claim was based on uncontroverted facts. first, she was the attorney for the agency whose employee was "reported" upon. The knowledge plaintiff had was derived from her position as the OSBC's attorney. She took no steps to present her concerns to the OSBC's head, Commissioner Dunnick, who had the authority to act against the employee alleged to be violating the law. The court found that plaintiff's reporting was contrary to the Model Rules of Professional Conduct (MRPC), adopted by this court in Supreme Court Rule 226 (1994 Kan. Ct. R. Annot. 286), and that there was no justification for plaintiff's failure, as the OSBC attorney, to approach, counsel, and advise Dunnick on the issue. Moreover, the court found that plaintiff proceeded on her course of conduct without more than a second-hand knowledge of the facts rather than relying on her own independent investigation. She did not report the full facts to her FDIC contact, Mr. Lamberti, because she did not know the full facts, including whether Stork had ever examined the Southwest Bank and Trust or personally participated in the examination of the State Bank of Baileyville.

The trial court further found that the statutes thought to have been violated by Stork, 18 U.S.C. § 213 (1988) and K.S.A. 9-1701(a), were not applicable unless Stork had in fact examined either of the banks in question or had interfered in or passed upon a matter in the examination of the banks. The court also found that whether Stork had violated 12 U.S.C. § 1829 (1988), which prohibits a

person who has entered into a diversion agreement from being involved in a financial institution without prior approval by the FDIC, was irrelevant because the prior diversion was not reported to the FDIC by plaintiff; the court further found that even if the claim was relevant, plaintiff never determined whether Stork had obtained written permission from the FDIC and there was a question whether the statute applied to Stork's minimal ownership interest (a 4.9% share of stock in a bank holding company that owned the State Bank of Baileyville).

The trial court held that to establish a whistle-blowing claim, plaintiff must establish that a reasonable person in her shoes, an attorney, would believe that a violation of law or matter of public concern existed and that the whistle-blowing was made in good faith and not for a corrupt or otherwise specious motive. The court found both a lack of good faith and a lack of good motive based on plaintiff's avoidance of a professional duty to her clients and her rush to judgment on supposition and surmise. Moreover, if the information was confidential when communicated because of the omission of a duty to a client or the lack of consultation with the client, the communication would grossly undermine the working relationship between the client and attorney and the balance of free speech and whistle-blower protection should not attach. The court pointed out that here the attorney-client relationship was not only neglected, but wholly abandoned.

The court pointed out that plaintiff's actions, taking the matter out of the hands of the OSBC, embarrassed Dunnick; how, after that, could the attorney-client or boss-employee relationship continue? Moreover, no exigency required plaintiff to avoid the procedures set forth in MRPC 1.13(b) (1994 Kan. Ct. R. Annot. 328) to counsel her clients. The court pointed out that plaintiff's actions were not the reasonable acts of an attorney toward her clients. Plaintiff's actions were those of an attorney representing herself rather than her clients.

The trial court did acknowledge that plaintiff's violations of the Model Rules of Professional Conduct did not present an absolute

bar to her claims. However, where plaintiff's claims are based on public policy and the right to speak on matters of public concern, those rights must be balanced with responsibility. Because of plaintiff's noncompliance with the ethical rules of her profession, her claims were found to be significantly diminished. Citing various authority, the court found that where the asserted rights did not interfere with the employment position, termination was not permitted, but where the right asserted impaired or impeached the working relationship, termination was permitted. The court, in essence, found that the plaintiff's exercise of her rights substantially interfered with her working relationship with her clients.

The court concluded:

> "The balancing of Ms. Crandon's interests under the First Amendment when weighed with her non-compliance with the tenets of her profession and the interest of the State of Kansas in properly assuring the fulfillment of the proper duties of the general counsel for the agency as well as the duties of the state bank commissioner to administer his office in the first instance, require Ms. Crandon's claims to be dismissed under the principles of law announced in *Connick v. Myers*, [461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983)], and *Pickering v. Board of Education*, [391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968)].
>
> "Mr. Dunnick was well within his discretion to end a public and professional relationship Ms. Crandon had completely and inappropriately destroyed without fear of legal recourse by Ms. Crandon."

Addressing plaintiff's claim under K.S.A. 1994 Supp. 75-2973, the court found that plaintiff disclosed information which was confidential pursuant to MRPC 1.6(a) (1994 Kan. Ct. R. Annot. 310) and MRPC 1.13(b) and until she satisfied those rules, plaintiff had no duty or privilege to disclose the information. Some of the information (that obtained from the bank examination documents) was also confidential under K.S.A. 9-1712 without the

Commissioner's approval. Moreover, the court found that no reasonable attorney would have perceived the conduct of the defendants as the basis for an out-of-agency report at the time it was made. The court specifically found that information which is confidential under the Model Rules of Professional Conduct is confidential "under any other provision of law" as that phrase is used in K.S.A. 1994 Supp. 75-2973(c)(4)(C), which permits discipline of an employee who releases confidential information. Additionally, the court found that plaintiff's knowledge that Stork had overdraft loans was confidential information.

Plaintiff appeals the trial court's ruling. This court permitted the ACLU and the Kansas Disciplinary Administrator to file briefs as *amici curiae*.

I. SUMMARY JUDGMENT

The plaintiff contends that the trial court erred in making certain findings of fact. She points out, correctly, that the trial court and this court must resolve all facts and inferences which may be drawn from the evidence in her favor as the party opposing summary judgment. See *Kerns v. G.A.C., Inc.*, 255 Kan. 264, 268, 875 P.2d 949 (1994).

First, the plaintiff argues that the trial court erred in concluding that she had reported on the OSBC and Dunnick. She claims that she reported only on the actions of Stork in her individual capacity. However, nowhere does the trial court find that plaintiff reported on the OSBC and Dunnick. Plaintiff is correct in suggesting that she reported on the actions of Stork. It does not appear that the trial court found otherwise.

Second, plaintiff argues that the trial court erred by resolving state of mind and motivation against her. She contends the trial court wrongfully accuses her of "assumption of agency power and authority to herself" and "her rush to judgment on supposition and surmise." Plaintiff cites *Hein v. Lacy*, 228 Kan. 249, 616 P.2d 277

(1980). In *Hein*, this court cautioned against granting summary judgment when resolution of the dispositive issue necessitates a determination of the state of mind of one or both of the parties. 228 Kan. at 256. The plaintiff is correct that there is no evidence she had a corrupt motive or was being vindictive. However, the quotes she points to from the trial court's journal entry concerning her actions do not show that the trial court determined her state of mind and motivation.

Third, the plaintiff argues that the trial court erred in concluding that she reported confidential information to the FDIC. Plaintiff suggests that the information concerning Stork's mortgages, car loans, and her diversion for theft of services were matters of public record. She also suggests that the trial court erred in relying on K.S.A. 9-1712, which provides that "[a]ll information the state bank commissioner generates in making an investigation or examination of a state bank or trust company shall be confidential information," because that statute must be strictly construed to mean documents generated only by the Commissioner. Plaintiff's construction, though not clearly argued, seems to be that documents prepared by other sources, including OSBC employees other than the Commissioner, are not covered by that statute. That construction is incorrect because the term "generates" encompasses documents prepared at the Commissioner's direction, including documents prepared during the course of an OSBC investigation or examination of a bank or trust company. Plaintiff also argues that K.S.A. 9-1712(b) provides that confidential information may be disclosed upon written approval of the Commissioner. She reasons that the OSBC office policy of communicating information to the FDIC on a regular basis satisfies the approval necessary under subsection (b). It does appear that the OSBC had a policy of communicating information generated during bank examinations to the FDIC. However, the real issue concerning confidentiality relates to the fact she was attorney for OSBC. Simply stated, attorneys have a different relationship than other employees, and their conduct is measured by a different standard.

Finally, plaintiff argues that the trial court erred in determining that she did not make an adequate investigation of the facts. She suggests that this issue was not raised by the defendants

and that the trial court should not have resolved it without giving the parties the opportunity to supplement the record. Nothing in the record, however, shows that the plaintiff attempted to supplement the record concerning this issue after the trial court's entry of judgment. Without our determining whether the plaintiff's investigation was "adequate," the record reflects the trial court found that plaintiff did "confirm by inspection at the Record of Deeds' office that the ownership of the property and the mortgage on it to the State Bank of Baileyville was in both Mr. and Mrs. Stork's name and... confirm title to the motor vehicle subject of the loan and lien of Southwest Bank and Trust was likewise in their names." The plaintiff also tells this court she reviewed federal and state statutes, case law, regulations, and internal ethics memoranda. The trial court did not ignore other aspects of investigation plaintiff claims to have done. The court merely found that plaintiff should have investigated whether Stork had actually examined or participated in examining the Southwest Bank and Trust and the State Bank of Baileyville. The plaintiff does not suggest she engaged in such investigation.

II. MODEL RULES OF PROFESSIONAL CONDUCT

The court held that plaintiff's actions were contrary to the Model Rules of Professional Conduct, citing MRPC 1.2 Scope of Representation (1994 Kan. Ct. R. Annot. 295), 1.4 Communication (1994 Kan. Ct. R. Annot. 302), 1.6 confidentiality of Information (1994 Kan. Ct. R. Annot. 310), 1.13 Organization as a Client (1994 Kan. Ct. R. Annot. 328), and 1.16 Declining or Terminating Representation (1994 Kan. Ct. R. Annot. 338).

The plaintiff argues that her conduct did not violate the Model Rules. She focuses on MRPC 1.6 and MRPC 1.13 and argues that she did not violate the rule of confidentiality. She points out that she had no attorney-client relationship with Stork or her husband, the persons she reported on. Stork was merely a constituent of her organization client, the OSBC. See MRPC 1.13. Moreover, the plaintiff argues, Stork never asked for plaintiff's legal advice. The plaintiff also reiterates that the facts she conveyed were in the public

domain, and she did not convey the information to entities other than the FDIC, such as the press. The plaintiff insists that she did not breach the attorney-client relationship she had with the OSBC. She maintains that the information was conveyed in a manner consistent with the established policy of the OSBC to convey information to the FDIC; she contends this policy permitted her to convey information to the OSBC without obtaining prior approval from Commissioner Dunnick. Finally, the plaintiff contends that K.S.A. 1994 Supp. 75-2973(b)(2) exempts her from obtaining prior approval.

The defendant's response is that confidences arise even when the person involved does not approach the attorney. The defendants suggest that plaintiff had a duty to keep Dunnick reasonably informed on all matters related to the representation. Because, according to defendants, violations of state and federal banking laws were within the scope of plaintiff's representation, strict confidentiality attached regardless of the source of the information, and plaintiff had a duty to explain the matters to the client. Moreover, defendants argue, trust and confidentiality are at the core of an attorney-client relationship. The attorney's duty is to advise and counsel, not prosecute her client. The defendants also point out that the drafters of the MRPC rejected a rule which would have permitted an organizational attorney to reveal information otherwise protected if the attorney deemed it necessary in the best interest of the organization. The defendants conclude that plaintiff was Commissioner Dunnick's attorney and that she had a duty to advise him on legal matters in the operation and function of the OSBC. They point out that she obtained information during the course of her representation that Deputy Commissioner Stork may have violated state or federal banking laws, but the only comment Dunnick had heard plaintiff make was her argument during the Emery civil service hearing that Stork had not violated any laws. This followed plaintiff's presentation of evidence (largely by leading questions) from Stork that her conduct did not violate any laws, rules, regulations, or guidelines. Therefore, the defendants reason, the plaintiff had a duty to counsel Dunnick as to her belief that Stork may have in fact violated laws. Because plaintiff went to the FDIC

rather than to Dunnick, the essence of confidentiality was breached. Finally, the defendants reason that it is irrelevant that Stork did not seek plaintiff's advice because organizational attorneys have a duty to advise constituents of potential conflicts and because that did not excuse plaintiff's duty to inform the Commissioner about any actions he needed to take.

We believe the parties have become overly technical and argumentative about the trial court's language. The trial court in general held that an organization's general counsel has obligations different than those of other employees. In using the balancing test discussed below, an attorney's obligation (as general counsel) is first and foremost to the organization. The balancing test as applied here includes the factors that general counsel reported a suspected violation or violations to an outside agency without first consulting with the head of the organization and that had she done so she would have learned that no violations had occurred. Whether plaintiff violated the Model Rules of Professional Conduct is not the determinative factor, and in fact a finding of no violation can be of no comfort to her.

The balancing test is set forth in *Connick v. Myers*, 461 U.S. 138, 75 L. Ed. 2d 708, 103 S. Ct. 1684 (1983), and *Pickering v. Board of Education*, 391 U.S. 563, 20 L. Ed. 2d 811, 88 S. Ct. 1731 (1968), and weighs an employee's First Amendment rights against the interests of the State as an employer in promoting the efficiency of the public services it performs through its employees.

In *Connick*, an assistant district attorney was involved and the United States Supreme Court said: "When close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." 461 U.S. at 151-52. The Supreme Court held the discharge of the assistant district attorney did not offend the First Amendment.

The *Connick* Court also held that whether an employee's right to speak on a matter of public concern outweighs the government employer's interest in effectively providing services is a

question of law and is subject to de novo review. See 461 U.S. at 150 n.10.

In *Goffer v. Marbury*, 956 F.2d 1045 (11th Cir. 1992), an attorney claimed wrongful discharge for exercising First Amendment rights. The court used language we deem applicable to our case:

> "The existence or not of attorney-client relations also bears on whether there was present the "close working relationshi[p]' referred to in *Connick* that gives rise to a 'wide degree of deference' to the employer's judgment. *Connick*, 461 U.S. at 151-52, 103 S. Ct. at 1692. Moreover, definition of Goffer's role with relation to defendants is prerequisite to addressing whether her speech so destroyed her effectiveness in that role that the government interest must prevail over her speech interest." 956 F.2d at 1051.

The Alabama Rules of Professional Conduct at issue in *Goffer*, as do the Kansas Model Rules of Professional Conduct, describe the role of an organization's attorney in the attorney's responsibilities owed to the organization and to the officers and employees of the organization.

As we view the matter, plaintiff was discharged because she was general counsel for the OSBC. The head of the OSBC had been advised of Stork's possible violations, at least as to the bank audit, and had determined there was no violation. He then attended a civil service hearing in which plaintiff put Stork on the witness stand to establish that she had not violated any federal or state laws and that no rules, regulations, or internal policies had been violated. Plaintiff argued to the hearing panel that Stork's testimony was that no violation had occurred.

The OSBC head then attended a meeting with FDIC officials involving other matters and he learned for the first time that plaintiff had twice reported possible violations (once prior to the civil service hearing and a second time either immediately preceding or

immediately after the panel hearing, based on largely different facts) to the FDIC without checking facts that were available to her which would have changed a reasonable attorney's mind. Whether the second reporting by plaintiff to the FDIC occurred before or after the panel hearing is not clear. The panel hearing was held on July 6 and the second telephone call reporting the alleged violations occurred (according to plaintiff's testimony) the first week in July.

Plaintiff's position as chief counsel for the organization required a close working relationship with Dunnick. Dunnick relied on plaintiff for legal advice for his guidance and for the guidance of the organization and its employees. The organization's attorney has a responsibility to give advice when necessary to prevent or rectify unlawful or improper acts of the organization and its employees. This advice must be given by presenting the attorney's opinion to the proper person or persons in the organization who have the authority to correct the problems. A close relationship and need for trust are essential in an attorney's relationship with the organization. Thus, a wide degree of deference to Dunnick's decision to terminate plaintiff is appropriate when something occurs to disrupt that relationship and trust.

We conclude that, although plaintiff may have acted in the utmost good faith, she used poor judgment and did not take steps available to her that a reasonably prudent attorney would have taken prior to reporting what she suspected to be violations to the FDIC, thus destroying her effectiveness as counsel for the OSBC and its employees and especially with the organization's head, Frankie Dunnick. Her acts destroyed any effectiveness she could have with the organization in the future. The governmental interest here must prevail over any First Amendment rights that might be involved. Thus, the trial court did not err in granting summary judgment to the defendants on plaintiff's First Amendment claim.

III. K.S.A. 1994 SUPP. 75-2973

K.S.A. 1994 Supp. 75-2973 provides in pertinent part as follows:

> "(b) No supervisor or appointing authority of any state agency shall:
>
> (1) Prohibit any employee of the agency from reporting any violation of state or federal law or rules and regulations to any person, agency or organization; or
>
> (2) require any such employee to give notice to the supervisor or appointing authority prior to making any such report.
>
> "(c) This section shall not be construed as:
>
> ....
>
> (4) prohibiting disciplinary action of an employee who discloses information which: (A) The employee knows to be false or which the employee discloses with reckless disregard for its truth or falsity, (B) the employee knows to be exempt from required disclosure under the open records act or (C) is confidential under any other provision of law."

The trial court found that no reasonable attorney in plaintiff's shoes could perceive the conduct of the defendants as the basis for an out-of-agency report at the time it was made. The court found that plaintiff's report was made with reckless disregard for its truth or falsity and that she released information which was confidential under the Model Rules of Professional Conduct.

The trial court pointed out that plaintiff had only a second-hand knowledge of facts and did not conduct her own independent investigation of the facts and consideration of the law. For example, plaintiff never knew whether Stork had personally participated in the ongoing examination of the State Bank of Baileyville and did not know whether Stork had compromised that examination. She also did not know that Stork had closed her checking account with the State

Bank of Baileyville. Moreover, the court stated, even by a cursory review of 18 U.S.C. § 213, the principle statute thought to be violated, there was no violation under *U.S. v. Napier*, 861 F.2d 547 (9th Cir. 1988), nor was the state statute, K.S.A. 9-1701(a), violated because Stork was not personally involved in examining a bank in which she had a financial interest. The trial court stated:

> "Accordingly, as a matter of law, unless Mrs. Stork had in fact proximately examined any bank at which she or her husband had loans, or subsequently and proximately obtained loans, or had interfered in, or aided and abetted in such interference, or passed upon a matter in the examination of such a bank on a material matter as Deputy Commissioner, Mrs. Stork's position as Deputy Commissioner would not place her in violation of, or within the sanction of, any criminal or ethics statute cited by Ms. Crandon as a basis for her 'report'."

The trial court correctly determined that unless Stork had personally examined or been involved in any way in an examination of the two banks, Stork would not have violated the law. See *Napier*, 861 F.2d at 548. Stork's financial interest in the State Bank of Baileyville following her pretrial diversion would likewise not be in violation of law if she received prior approval. Plaintiff could have conducted a further investigation before making her report to the FDIC to determine whether Stork had in fact been involved in the examinations of the State Bank of Baileyville and the Southwest Bank and Trust, and she could have obtained information whether Stork had obtained approval for her financial interest in the State Bank of Baileyville despite her pretrial diversion.

K.S.A. 1994 Supp. 75-2973(c)(4)(A) does not require a person to make sure the conclusions to be drawn from information are true before making a disclosure. However, a person receives no statutory protection when he or she makes a disclosure with a reckless disregard for the truth of falsity of the disclosure made. An attorney, and especially the chief counsel, is held to a higher standard

for the reasons set forth in section II. We affirm the trial court on this issue.

IV. OTHER ISSUES

For the reasons stated in sections II and III, plaintiff's common-law claims cannot be sustained.

Other issues raised by the parties need not be addressed.

Affirmed.